

VZCZCXRO6938
RR RUEHDA
DE RUEHAK #1843/01 3630821
ZNR UUUUU ZZH
R 290821Z DEC 09
FM AMEMBASSY ANKARA
TO RUEHC/SECSTATE WASHDC 1573
INFO RUCPDOG/USDOC WASHDC
RUEATRS/TREASURY DEPT WASHDC
RUCPDOG/DEPT OF COMMERCE WASHDC
RUCPCIM/CIMS NTDB WASHDC
RUEHIT/AMCONSUL ISTANBUL 6693
RUEHDA/AMCONSUL ADANA 4347

UNCLAS SECTION 01 OF 02 ANKARA 001843

SIPDIS

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E.O. 12958: N/A

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SUBJECT: CANCELLED TRADEMARK CASES STILL UNRESOLVED

REF: A) 08 ANKARA 2175, B) 08 ANKARA 2191, C) ANKARA 15, D)
ANKARA 48, E) ANKARA 117

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1. (SBU) Summary: As reported in reftels, the temporary suspension in 2008 of the criminal provisions of Decree 556 (Trademark Law) led to the cancellation of as many as 9,000 IPR cases and the possible re-entry of millions of units of seized counterfeit goods into the Turkish market. Previously, Ministry of Justice officials promised that these cases would be considered under the "unfair competition" provision of the commercial code. However, some recent lower and appeals court rulings have found no legal basis for criminal prosecution and have ordered that the seized counterfeit goods be returned to defendants. Although the Ministry of Justice could intervene and issue new guidance to the courts, this seems unlikely. If the counterfeit goods re-enter the market, the new trademark law would give the companies the right to re-seize the goods if counterfeiters decided to sell them again, but would entail enormous costs to injured companies to re-open court cases, as well as requiring law enforcement to duplicate seizures, presumably against more savvy criminal operations. End summary.

2. (SBU) On July 5, 2008, the Constitutional Court struck down the provisions of the "Protection of Trademarks" law (Decree 556) that made trademark violations a crime. A new amendment to re-criminalize trademark violations was passed in January 2009, but was not retroactive, causing the cancellation of up to 9,000 pending IPR cases (see reftels for further detail). At the time, the Ministry of Justice promised that the canceled cases would be considered under the "unfair competition" provision of the commercial code. Unfortunately, recent lower court rulings found no legal basis for criminal prosecution and ordered that confiscated goods should be returned to the former defendants. Reportedly, many of the defendants were dealing in such large volumes - tens of thousands of units - that it was strongly likely that they were organized crime elements engaged in manufacture as well as distribution, rather than just small-time sellers.

3. (SBU) Representatives of several companies affected by the recent rulings met with ECON and FCS staff on December 10, 2009 to identify potential courses of action to stop the counterfeit goods from re-entering the market. Many of the companies have appealed the decisions to return the goods, but the first wave of Court of Appeals decisions indicates that the rulings of the lower courts will be upheld. Thirteen international brands have identified 5,374 cases that have

been or may be impacted, representing more than 2.6 million units of counterfeit goods which would return to defendants.

¶4. (SBU) The courts have ordered the destruction of products in some cases, such as cosmetics and perfumes, on the basis of public health concerns. This would not apply to textiles or footwear products, and as it is only a crime to sell counterfeit goods (possession is not criminal), the police cannot simply re-seize the goods absent an actual attempt to market them. The companies claim that the Minister of Justice could make an extraordinary appeal and issue guidance to the courts, but this seldom-used option is unlikely, and would be dependent upon a series of strict conditions that this situation does not appear to meet. Another option would be for the GOT to criminalize possession of a sufficiently large number of counterfeit goods (similar to antinarcotics laws that presume the intent to distribute). The companies are investigating that option, but such a legislative fix is unlikely to happen quickly enough to help.

¶5. (SBU) Companies affected by these cases are left with few options except to prepare for the counterfeit goods to re-enter the market. The new trademark law would give them the right to re-seize any goods which counterfeiters attempt to sell again on the market, and they could then be tried under the new code. The associated legal costs are likely to be enormous, however, and goods returned to smaller street vendors are probably not going to justify this extra expense and effort.

¶6. (SBU) Comment: The position of the Turkish courts is

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legally correct - in the absence of a crime, the state has no legal right to deprive individuals of property. As the only reason there is no crime is because of the GOT's own inability to fix a technical legal problem by a known deadline, however, the GOT should be more willing to work out an equitable solution that does not allow counterfeit goods back onto the market. Post will continue to raise this issue with GOT interlocutors, especially as we begin discussions with them on this year's Special 301 process. End comment.